outside of and higher than themselves. Any deep and lasting relationship presupposes a common good of some sort as the ground of their unity. It rests ultimately on God, the supreme good, the love of which is implied in the love of any lesser good that one may wish to pursue.[36]

Let me conclude, by relating Fortin's theme of desire to his reflection on *epektasis*. About the latter he wrote,

> The life of the soul, as the Church Fathers saw it, is not a state but a dynamic situation characterized by unceasing progress, indeed, not just an *extasis* or going out of oneself but an *epektasis* or perpetual going beyond oneself in the direction of an ever more perfect God-likeness. Such is the view which St. Paul advances in an often quoted passage of Phil 3:12–14, and which Gregory of Nyssa expressed in a nutshell when he suggested that "to find God is to seek Him endlessly."[37]

The verse in Paul reads, "one thing I do, forgetting what lies behind and straining forward (*epekteinomenos*) to what lies ahead I press on toward the call for the prize of the upward call of God in Jesus Christ." A central key to Fortin's work is the notion of *epektasis*: to stretch oneself to the limit by loving in the right way with ever greater understanding and intensity.

Epektasis, of course, not only requires an individual effort, but depends decisively on continuous instruction and exhortation in a Christian community. A closer look at Assumption College's motto is helpful here: "*donec Christus formetur in vobis*." This comes from Paul's letter to the Galatians 4:19 and the full text reads, "My children, for whom I again suffer birth pangs until Christ be formed in you." The image of birth pangs is a graphic image conveying all that we have to do in order to help our brothers and sisters rouse themselves to put on Christ.

As an educator, Ernest Fortin always tried to embody this ideal. Young people keep discovering his writings and are inspired to make life decisions on the basis of what they learn. My hope is that Fortin's vision of education, theology, and political philosophy will, likewise, be a vital inspiration to Catholic colleges. □

[36] "Augustine and the Hermeneutics of Love: Some Preliminary Considerations" in vol. 1 of *Ernest L. Fortin: Collected Essays*, 9.

[37] Review of Gerhard B. Ladner, *The Idea of Reform: Its Impact on Christian Thought and Action in the Age of the Fathers* (Harvard University Press, 1959),

On the Presumed Medieval Origin of Individual Rights

Ernest L. Fortin

> [T]here exists a specifically modern notion of rights that comes to the fore with Hobbes . . . and distinguishes itself from all previous notions, not so much by its definition of right as power, as by its proclamation of rights rather than duties as the primary moral counter.

Few issues pertaining to the history of ethical and political thought have proved more intractable over the years than that of the relationship of individual or subjective rights to the more traditional natural law approach to the study of moral phenomena. Some prominent theorists, such as C.B. MacPherson and Leo Strauss, have long argued that the two doctrines are irreducibly different and incompatible with each other,[1] whereas other

[1] C.B. MacPherson, *The Political Theory of Possessive Individualism* (Oxford and New York: Oxford University Press, 1962). L. Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), esp. 181–83. This is not to suggest that Strauss and MacPherson are in complete agreement with

Ernest L. Fortin taught theology and political theory at Boston College, where he also co-directed the Institute for the Study of Politics and Religion.

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scholars—Jacques Maritain, John Finnis, and James Tully, to name only three[2]—see the rights doctrine, not as a substitute for its predecessor, but either as a more polished version of it or a useful complement to it. The matter is of no small consequence for decent citizens who worry about a possible tension between the biblical component of the American Founding and the Framers' apparent commitment to an Enlightenment concept of rights that, to paraphrase Tocqueville, promotes egoism to the level of a philosophic principle. It is also a source of concern for Catholic ethicists who are uneasy with the gradual erosion of the once ubiquitous natural law and its supersession by a focus on rights in recent Church documents and Catholic theology generally. If the rights doctrine is not only compatible but essentially continuous with the natural law doctrine, any qualms that one may have about acquiescing in it may be safely laid to rest. If, alternatively, the two doctrines are demonstrably at odds with each other, the qualms may not be wholly unwarranted.

One way to tackle the problem is to inquire into the intellectual pedigree of the rights theory. Unfortunately, scholarly opinion is sharply divided on this issue as well, as can be seen from a brief survey of the recent literature on the subject. Three names stand out among others in this connection.

The first is that of Michel Villey, the distinguished French legal historian and philosopher, who in his book on the formation of modern juridical thought[3] and numerous other publications stretched out over a fifty-year period has sought to prove that the father of the rights theory as we know it is William of Ockham.

each other. See in this connection Strauss's review of MacPherson's book, reprinted in Leo Strauss, *Studies in Platonic Political Philosophy*, ed. T.L. Pangle (Chicago and London: The University of Chicago Press, 1983), 229–31.

[2]J. Maritain, *The Rights of Man and Natural Law* (New York: Scribners, 1943); *The Person and the Common Good* (Notre Dame: University of Notre Dame Press, 1966). J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980). J. Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980).

[3]*La formation de la pensée juridique moderne*, 4th ed. (Paris, 1975).—This paragraph and a few others that follow incorporate materials used in a previous article, "Sacred and Inviolable: *Rerum Novarum* and Natural Rights," *Theological Studies* 53 (1992): 203–33. (This article is reprinted in vol. 3, chap. 16, of Fortin's *Collected Essays* entitled *Human Rights, Virtue, and the Common Good: Untimely Meditations on Religion and Politics* [Lanham, MD: Rowman & Littlefield, 1996]).

For Villey, everything hinges on the distinction between objective right—"the right thing" (*ipsa res iusta*), "one's due" or one's proper share, Ulpian's *suum ius cuique tribuere*—and subjective right, by which is meant a moral power (*potestas*) or faculty (*facultas*) inhering in individual human beings. How and to what extent the two notions differ from each other becomes plain when we recall that "right" in the first sense does not necessarily work to the advantage of the individual whose right it is. In Rome, the right of a parricide was to be stuffed in a bag filled with vipers and thrown into the Tiber. Ockham, the villain of Villey's story, is the man who consummated the break with the premodern tradition by accrediting that monstrosity known as subjective rights or rights that individuals possess as opposed to rights by which so to speak they are possessed. His is the work that marks the "Copernican moment" in the history of legal science.[4] In Villey's view, a straight path leads from Ockham's nominalism, according to which only individuals exist, to the rights with which these individuals are invested; for not until the rise of philosophic nominalism in the late Middle Ages could such a novel conception of rights have seen the light of day.

The second author to be reckoned with is Richard Tuck, whose book on the origin of natural rights theories,[5] acclaimed by many as a breakthrough when it came out in 1979, is a history of the notion of subjective rights from its supposed twelfth-century origins to its full expression in the works of Locke and, before Locke, Grotius, who finally "broke the ice"[6] by casting off the shackles of Aristotelian philosophy. Tuck distinguishes between *passive* rights, by which he means rights reducible to duties incumbent on other people, and the more pertinent *active* rights or rights understood as the absolute liberty to do or to forbear.[7] Two great periods mark this history: 1350–1450, which witnessed the flowering of Nominalism, and 1590–1670, the period in which the rights doctrine finally came into its own with the publication

[4]M. Villey, "Genèse du droit subjectif chez Guillaume d'Occam," *Archives de philosohie du droit* 9 (1964): 127.

[5]*Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979).

[6]Ibid., 175. The expression is a quotation from Barbeyrac, *An Historical and Critical Account of the Science of Morality*, prefaced to S. Pufendorf, *The Law of Nature and Nations*, trans. B. Kennet (London: J.J. Bonwick, 1749), 55, 63, 98.

[7]*Natural Rights Theories*, 5–6.

of the great works not only of Grotius and Locke but of such other eminent theorists as Suarez, Selden, Hobbes, Cumberland, and Pufendorf. I note in passing that, with admirable intellectual integrity, Tuck has since repudiated in private conversation part of the argument of his book. I do not know whether he has yet done so in writing.

The third protagonist in this unfolding saga is Prof. Brian Tierney, who in the last ten years or so has inundated us with a spate of articles purporting to demonstrate that the now triumphant rights doctrine is indeed an early rather than a late-medieval or a specifically modern contribution to the development of political and legal theory.[8] Against Villey, Leo Strauss, and a number of Strauss's followers, among them Walter Berns (Tierney's one-time colleague at Cornell) and Arlene Saxonhouse,[9]

[8]These articles include: "Tuck on Rights, Some Medieval Problems," *History of Political Thought* 4 (1983): 429–40; "Villey, Ockham and the Origin of Individual Rights," *The Weightier Matters of the Law: A Tribute to Harold J. Berman* (The American Academy of Religion, 1988): 1–31; "Conciliarism, Corporatism, and Individualism: the Doctrine of Individual Rights in Gerson," *Cristianesimo nella storia* 9 (1988): 81–111; "Marsilius on Rights," *Journal of the History of Ideas* 52 (1991): 3–17; "Origins of Natural Rights Language: Texts and Contexts, 1150—1250," *History of Political Thought* 10 (1989): 615–49; "Aristotle and the American Indians—Again," *Cristianesimo nella storia* 12 (1991): 295–322; "Natural Rights in the Thirteenth Century: A *Quaestio* of Henry of Ghent," *Speculum* 67 (1992): 58–68; and an as yet unpublished paper entitled "1492: Medieval Natural Rights Theories and the Discovery of America," written for the quinquennial meeting of the International Society for the Study of Medieval Thought held at Ottawa in August, 1992, which summarizes in readily assimilable form the results arrived at in the previous articles. The paper is scheduled to appear in the Proceedings of the conference.

[9]Cf. Tierney, "Conciliarism, Corporatism," 88: "One school of thought holds that all modern rights theories are rooted in the atheistic philosophy of Hobbes and hence regards them as incompatible with the whole preceding Christian tradition." The reference is to an article by Walter Berns in *This World* 6 (1983): 98. See "Villey, Ockham," 20, n.74, where Berns is taken to task for having written that "natural rights and traditional natural law are, to put it simply yet altogether accurately, incompatible." In Tierney's opinion, "[s]uch views seem based on a mistaken idea that modern rights theories are derived entirely from Hobbes and on simple ignorance of the history of the concept of *ius naturale* before the seventeenth-century." In "Natural Rights in the Thirteenth Century," 58, Tierney takes issue with Saxonhouse's contention that prior to the seventeenth-century people did not think of individuals "as possessing inalienable rights to anything—much

Tierney argues that there is no significant hiatus or breach of continuity between the medieval and modern understandings of right. His thesis in a nutshell is that the subjective rights to which Villey points as the hallmark of modernity are in fact an invention of the brilliant canonists and civil lawyers of twelfth- and thirteenth-century Europe, whose writings he subjects to a far more painstaking scrutiny than either Villey or Tuck had done. In Tierney's own words,

> The doctrine of individual rights was not a late medieval aberration from an earlier tradition of objective right or of natural moral law. Still less was it a seventeenth-century invention of Suarez or Hobbes or Locke. Rather, it was a characteristic product of the great age of creative jurisprudence that, in the twelfth and thirteenth centuries, established the foundations of the Western legal tradition.[10]

Tierney's point against Villey is both well taken and ably documented. His articles have shown, convincingly in my opinion, that the definition of rights as "powers" antedates the Nominalist movement by some two centuries and that in this matter Ockham and his followers were not the radical innovators Villey makes them out to be. Further support for this conclusion is to be found in the fact that Ockham's treatment of the natural law, long a bone of contention among scholars, is anything but revolutionary,[11] as we know now that the egregious mistake contained in the printed editions of his classic statement on the subject has been corrected on the basis of a fresh reading of the manuscripts.[12] Ockham's threefold division of the natural law into principles that apply (a) to both the prelapsarian and

less life, liberty, property, or even the pursuit of happiness." Cf. *Women in the History of Political Thought* (New York: Praeger, 1985), 7.

[10]"Villey, Ockham," 31.

[11]On Ockham's conservatism, see Tierney's remarks in "Villey, Ockham," 19, citing John Morrall, who describes Ockham as "an interpreter and defender of the achievements of the past."

[12]Ockham, *Dialogus* Part 3, Tr. 2, Book 3, 6. The most recent edition is that of M. Goldast (Frankfurt, 1614), which merely reproduces the Lyons edition of 1494, along with its mistakes. The corrected text is to be found in H.S. Offler, "Three Modes of Natural Law in Ockham: A Revision of the Text," *Franciscan Studies* 15 (1977): 207–18. The mistake in the Goldast edition concerns the second level of natural law and consists in reading the unintelligible *quod ideo est naturale quia est contra statum naturae institutae* for the *quod ideo dicitur naturale quia contrarium est contra statum naturae institutae* of the manuscripts.

postlapsarian stages of humanity and are therefore unchangeable (e.g., the prohibition against lies and adultery), or (b) only to the prelapsarian stage (e.g., the community of goods and the equality of all human beings), or (c) only to the postlapsarian stage (e.g., private property, slavery, and warfare) does little more than systematize what the canonical tradition routinely taught. If Ockham can be said to have innovated, it is not in regard to this issue; it is rather in regard to the theoretical foundation of the natural law, whose principles are said by him to owe their truth, not to God's intellect, but to his will alone, to such an extent that God could command us to hate him if he so desired.[13] Simply put, no human act is intrinsically good or bad; it becomes such solely by reason of its being enjoined or forbidden by God.[14]

For all its outstanding merits, however, Tierney's demonstration is not without problems of its own, one of them being, not that it uncovers traces of subjective rights in the Middle Ages, but that it constantly refers to these rights as "natural," something that few medieval authors, and none of those cited by Tierney himself, ever do, with the one exception of Nicholas of Cusa, to whom I shall return. In the vast majority of cases, the rights in question are called "rights" without qualification and appear to have been understood as civil or canonical rights. This is typically the case with Gerson, who discusses at great length the rights of popes, bishops, and local prelates, or the rights of mendicant friars to preach, hear confessions, and receive tithes, all of which manifestly belong to the realm of positive and specifically ecclesiastical rather than natural right.[15]

One does encounter the expression *iura naturalia* (natural rights) on a few scattered occasions not mentioned by Tierney, but its meaning bears little resemblance to the one that attaches to it from the seventeenth-century onward. Augustine used it in

[13]Cf. Ockham, *Quaestiones in librum secundum Sententiarum* 2.15.3–4, in *Opera Theologica*, vol. 5, ed. G. Gal and R. Wood (New York: St. Bonaventure, 1981), 2.15.3–4, p. 347–48.

[14]See Suarez's discussion of Ockham's position in his *De legibus ac Deo legislatore*, 2.7.4. English translation by G.L. Williams et al., *Selections from Three Works of Francisco Suarez, S.J.*, vol. 2 (Oxford and London: Clarendon Press and H. Milford, 1944), 190.

[15]See, for example, Tierney, "Conciliarism, Corporatism," 94, who notes that *Consideratio* 12 of Gerson's *De potestate ecclesiastica*, which immediately precedes the formal definition of *ius* in *Consideratio* 13, "is devoted entirely to a discussion of *iura*—the rights of popes, kings, bishops, and lesser prelates in the conduct of church affairs."

the midst of the Pelagian controversy in an effort to explain how original sin, the sin committed by Adam and Eve, could have been transmitted to their descendants. The rights of which he speaks are the "natural rights of propagation"—*iura naturalia propaginis*—whereby the offspring, who are somehow precontained in the ancestor, are thought to inherit through birth the characteristic features of his fallen nature.[16] In a similar manner, St. Jerome speaks of incest as a violation of the natural rights—*iura naturae*—of a mother or a sister.[17] In other instances, the link with our modern rights theory is even more tenuous. Primasius of Hadrumetum describes the antlers that burst forth from the heads of certain animals and keep growing and growing as violating the "natural rights of places"—*naturalia locorum iura*.[18] None of this, needless to say, adds up to a *bona fide* natural rights theory imbedded in a coherent and properly articulated framework.

Nor, as I have intimated, can the concept of natural rights be said to play a significant role in medieval thought. Tierney himself acknowledges that Thomas Aquinas did not have a theory of natural rights,[19] but, to the best of my knowledge, no medieval writer either both before or after him ever tried to elaborate such a theory. If the information at our disposal suggests anything, it is that rights as the medievals understood them were subservient to an antecedent law that circumscribes and relativizes them. For Ockham, a "right" was a "lawful power," *licita potestas*.[20] For his contemporary, Johannes Monachus, it was a "virtuous power," *virtuosa potestas*, or a power "introduced by law," *a iure*

[16]Augustine, *Contra Iulianum Opus Imperfectum* (*Against Julian: An Unfinished Work*) 6.22.

[17]Jerome, *In Amos*, 1.1.

[18]Primasius of Hadrumetum, *Commentary on the Apocalypse* 2.5.

[19]"Natural Rights in the Thirteenth Century," 67. According to Busa's exhaustive *Index Thomisticus*, the word *iura* occurs a total of fifty-four times in Thomas's voluminous corpus, but never in the sense of natural rights. In all cases, the reference is to canonical or civil rights, or to the ancient as distinguished from the new codes of law, or to the laws governing warfare and the like.

[20]Cf. Villey, "La genèse du droit subjectif chez Guillaume d'Occam," *Archives de philosophie du droit* 9 (1964): 117. Even without the addition of *licita*, *potestas* often means a "legal" power, as distinguished from *potentia*, which can designate a premoral power. It is true that the distinction between the two is not always strictly observed.

introducta.[21] As the adjectives used to qualify them imply, these rights were by no means unconditional. They were contingent on the performance of prior duties and hence forfeitable. Anyone who failed to abide by the law that guarantees them could be deprived of everything to which he was previously entitled: his freedom, his property, and in extreme cases his life. Not so with the natural rights on which the modern theorists would later base their speculations and which have been variously described as absolute, inviolable, imprescriptible, unconditional, inalienable, or sacred.

In support of his thesis that rights are an invention of the Middle Ages, Tierney notes that the precept "Honor thy father and thy mother" is not only a commandment; it also means that parents have a subjective right to the respect of their children.[22] Fair enough, although these are not the terms in which the medievals were wont to pose the problem. Their question was not whether parents have a right to be respected by their children but whether it is objectively right that they be respected by them. Even if one grants the legitimacy of Tierney's inference, however, one is still left with the problem of determining which of the two, the right or the duty, comes first and of deciding what is to be done in the event of a conflict between them. Is this subjective right, assuming that it exists, inalienable, or could it sometimes be overridden by more compelling interests?

Granted, one cannot conclude from the absence of any explicit distinction between objective and subjective right in their works that the classical philosophers and their medieval disciples would have objected to the notion of subjective rights or rights as moral faculties or powers, for such they must somehow be if by reason of them human beings are authorized to do or refrain from doing certain things. Since rights are already implied in the notion of duty—anyone who has a duty to do something must have the right to do it—there appears to be no reason to dichotomize them. What they represent would be nothing more than the two sides of a single coin. If, as was generally assumed in the Middle Ages, there is such a thing as the natural law, one has every reason to speak of the rights to which it gives rise as being themselves natural.

[21] Johannes Monachus, *Glossa Aurea* (Paris, 1535), fol. 94, Glossa ad Sect. 1.6.16. Tierney, "Villey, Ockham," 30.

[22] "Villey, Ockham," 20.

This is in fact what appears to have been done explicitly by a small number of late-medieval writers such as Marsilius of Padua, Ockham, and Nicholas of Cusa, in whose works the expression *iura naturalia* makes an occasional appearance. Marsilius refers to certain rights (*iura*) as "natural" because in all regions "they are in some way believed to be lawful and their opposites unlawful."[23] Nothing suggests he had any intention of breaking with his predecessors, at least as regards the subordination of these rights to the natural law, about which, paradoxically, he himself seems to have had serious doubts.[24] Ockham uses the same expression at least once, but again within the context of a discussion of the natural law.[25] Nicholas of Cusa, to whom I have already alluded, does something similar when he writes:

> There is in the people a divine seed by virtue of their common equal birth and the equal *natural rights* of all human beings (*communem omnium hominum aequalem nativitatem et aequalia naturalia iura*) so that all authority, which comes from God as do all human beings . . . is recognized as divine when it arises from the common consent of the subjects.[26]

Unfortunately, Nicholas does not volunteer any further information on what he means by a "natural right" or call special attention to the expression, as well he might have if he had wanted to give it a new and more pregnant meaning. He too merely echoes the traditional medieval view according to which the early humans were free and equal insofar as they knew nothing of political authority, slavery, or private property.[27]

[23] *Defensor Pacis* 2.12.7.

[24] The gist of Marsilius's argument is that universally admitted moral principles are not fully rational and, conversely, that fully rational principles are not universally admitted. Cf. L. Strauss, "Marsilius of Padua," in *History of Political Philosophy*, 3rd. edition, ed. L. Strauss and J. Cropsey (Chicago: University of Chicago Press, 1987), 292–93.

[25] *Dialogus* Part 3, Tr. 2, Book 3, 6.

[26] *De concordantia catholica* (The Catholic Concordance), trans. P. Sigmund, slightly modified (Cambridge, England and New York: Cambridge University Press, 1991), 230. The original text is to be found in Nicholas of Cusa *Opera Omnia* 3.4, 331, ed. G. Kallen, vol. 14 (Hamburg, 1963), 348. The text is cited by Tierney, who does not call attention to the rarity of the expression. Cf. "Conciliarism, Corporatism," 109.

[27] Nicholas's treatise was presented to the Council of Basel in early 1434. It clearly reflects Nicholas's conciliarist leanings and was calculated to support his views on this subject. See also G. de Lagarde, "Individualisme

To repeat, nowhere in the Middle Ages does one come across a natural rights teaching comparable to the one set forth in the works of a host of early modern political writers, beginning with Hobbes. The most that can be said is that, on the basis of their own principles, the medievals could conceivably have put forward a doctrine of natural rights rooted in natural law. They never did. Why? The simplest answer is that in matters of this sort they tended to take their cue from the Bible, the Church Fathers, Roman law, the canon law tradition, and Aristotle's *Ethics* and *Politics* once they became available in Latin translation during the course of the thirteenth-century. In none of these texts is there any thematic treatment of or stress on natural rights.[28] For better or for worse, natural rights in our sense of the term were largely alien not only to the medieval mind but to the literature of the entire premodern period.

One can certainly agree with Tierney that the surge of interest in legal theory from the twelfth-century onward is a remarkable phenomenon, but it does not of itself signal the emergence of a new concept of right. The occasion was the recent adoption of Roman law in the West, necessitated by the pressing need to find solutions to such typical problems as the relation between the pope and the emperor, between the emperor and the lesser rulers of Christendom, between rulers and subjects, between mendicants and seculars, and so on, or else to determine such issues as the rights of property (particularly as these affected religious orders) or the rights of infidels—all of which called for

et corporatisme au moyen âge," in *L'organisation corporative du moyen âge à la fin de l'Ancien Régime* (Louvain: Bureaux de Recueil Bibliothèque de l'université, 1937), 52.

[28]The Bible certainly knows nothing of natural rights. If it is famous for anything, it is for promulgating a set of commandments or, as one might say, a Bill of Duties rather than a Bill of Rights. The term "rights" in the plural, *iura*, does not appear even once in the Vulgate, for centuries the standard version of the Bible in the West. *Ius* in the singular occurs approximately thirty times, but always to designate some legally sanctioned arrangement. Genesis 23:4 speaks in this sense of a *ius sepulchri* or right of burial apropos of Abraham, who discusses with the Hittites the possibility of acquiring a tomb for Sarah. As is clear from the context, Abraham is not claiming any kind of right and has no need to do so, for the Hittites were offering him free of charge their "choicest sepulchres" to bury his dead. The Hebrew Bible itself makes no attempt to define this or any other right. Since it has no word for "nature" and in any event does not engage in philosophic speculation, it can hardly be expected to describe such rights as "natural."

an approach to moral matters that focused to an unprecedented degree on rights and duties. Ockham himself, whose supreme ambition in later life, as Tierney notes, was to have Pope John XXII declared a heretic,[29] was motivated by a similar set of concerns. In all such cases, the rights under consideration were legal rights, sanctioned either by the civil law, the divine law, or, if one wants to go beyond what the medievals explicitly taught, the natural law. Tierney himself puts the matter in proper medieval perspective when he writes:

> In fact, one finds natural rights regarded as derivative from natural law at every stage in the history of the doctrine—in the twelfth-century renaissance of law, in the eighteenth-century Enlightenment and still in twentieth-century discourse.[30]

Part of the confusion in this instance arises from the fact that what Tierney has in mind when he refers to the eighteenth-century is not the characteristic Enlightenment view of rights but Christian Wolff's assertion that "[t]he law of nature (*lex*) obliges man to perfect himself . . . *ius* is called a faculty or moral power of acting . . . *ius* provides the means for what *lex* provides as an end."[31] Similarly, when he speaks of "twentieth-century discourse," he is thinking not of Rawls and Dworkin but of Maritain and Finnis, two authors who like Wolff are committed to a basically premodern understanding of justice and morality, however much they may be influenced, as was Wolff, by modern modes of thought. None of this meets the crucial question head-on, which has to do, not with whether the premoderns had any notion of subjective rights, but with the order of rank of rights and duties.

On this score, the likeliest supposition is the one according to which there exists a specifically modern notion of rights that comes to the fore with Hobbes in the seventeenth-century and distinguishes itself from all previous notions, not so much by its definition of right as power, as by its proclamation of rights rather than duties as the primary moral counter. Nowhere is the new position formulated more clearly than in chapter 14 of *Leviathan*, which begins with a forceful assertion of the primacy of the natural right of self-preservation, that is, of the right that

[29]"Villey, Ockham," 19.

[30]Ibid., 20–21.

[31]C. Wolff, *Institutiones iuris naturae et gentium, Gesammelte Werke*, 26 (Halle, 1750), 23–24; quoted by Tierney, "Conciliarism, Corporatism," 102.

each individual possesses to resist anyone who poses, or is thought to pose, or could conceivably pose a threat to his existence or well-being. From this primordial *right* of nature Hobbes goes on to deduce the whole of his simplified morality and, in particular, the various *laws* of nature—nineteen of them in all—that reason devises and to which human beings bind themselves when, for the sake of their own protection, they "enter" into civil society. In Hobbes's own words,

> The RIGHT OF NATURE, which writers commonly call *ius naturale*, is the liberty each man has to use his own power, as he will himself, for the preservation of his own nature—that is to say, of his own life—and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto.

This is precisely the teaching that was taken over by subsequent theorists, including Locke, who points out that "in the state of nature everyone has the executive power of the law of nature,"[32] a teaching that he himself tells us is not only strange but "very strange."[33] This teaching is clearly of a piece with the Hobbesian notion of the "state of nature," that prepolitical state in which one is not bound by any law whatsoever and is free to deal with others as one sees fit.[34] Nothing could be further from the traditional view, which knows of no state in which human beings are not subject to some higher authority and views the meting out of punishments—Locke's "executive power of the law of nature"—as the prerogative of rulers and no one else. To refer to Thomas Aquinas once again, anyone is free to reward others for doing good but only the "minister of the law" has the authority to punish them for doing evil.[35] Gratian's *Decretum* is even more explicit, calling any private individual who takes it upon himself to put a criminal to death a "murderer": *Qui sine aliqua publica administratione maleficum interfecerit velut homicida*

[32] Locke, *Second Treatise of Civil Government*, nos. 6, 7, 8, and 13.

[33] Ibid., no. 13. See also no. 9, where the same teaching is likewise described as "very strange."

[34] Cf. Hobbes, *De cive*, 1.8–9. Spinoza, *Political Treatise* 2.18: "In the state of nature, wrongdoing is impossible; or, if anyone does wrong, it is to himself, not to another."

[35] *Summa Theologiae* 2–2.64.3. Also 1–2.92.2.3, and 90.3.2. Thomas's teaching follows roughly Aristotle, *Nicomachean Ethics* 10.15–24. Cf. Suarez *De legibus* 3.4.3. Grotius, *De iure belli et pacis* 2.20.3.

iudicabitur, et tanto amplius quanto sibi potestatem a Deo n concessam usurpare non timuit.[36]

The opposition between the old and the new views equally striking when one turns to the question to whic Tierney's article on Henry of Ghent is entirely devoted, namel whether a criminal who has been justly sentenced to death allowed to flee if the opportunity presents itself.[37] From Tierney article we learn that a convict does have that right, but only a long as he can exercise it without injuring anyone else—*sin iniuria alterius*.[38] This position is not essentially different from th one taken by Thomas Aquinas, who also argued that a prisoner i not morally obliged to stay in jail while awaiting his executio but is nevertheless strictly forbidden to use physical force t defend himself against the executioner.[39] The only point tha distinguishes the two authors, and it is a minor one, is Henry's claim that under certain circumstances fleeing may be a "neces- sity" or a positive duty, the reason being that refusing to flee would be tantamount to committing suicide.[40] In this matter

[36] Gratian *Decretum* 1.23.8.33. The text follows Augustine *De civitate Dei* (*City of God*) 1.21. A literal translation of Gratian's latin is as follows: "a person without public authority who puts a criminal to death will be judged a murderer, and all the more so as he did not fear to usurp for himself a power not given by God."

[37] The pertinent text by Henry of Ghent is *Quodlibet* 9.26, *Opera Omnia*, ed. Raymond Macken (Leuven: Leuven University Press, 1983), vol. 13, 307–310.

[38] Ibid., 308. Cf. Tierney, "Natural Rights in the Thirteenth Century," 64.

[39] *Summa Theologiae* 2–2.69.4.2: "... nullus ita condemnatur quod ipse sibi inferat mortem sed quod ipse mortem patiatur. Et ideo non tenetur facere id unde mors sequatur, quod est manere in loco unde ducatur ad mortem. Tenetur tamen non resistere agenti quin patiatur quod iustum est eum pati." The example in terms of which the problem was discussed in antiquity was that of Socrates, who could easily have fled with the help of powerful friends but chose instead to die, ostensibly in obedience to the laws of the city. As the *Crito* suggests, however, his real reasons for doing so were quite different. At the age of seventy, with at best only a few more years to live and faced with the unattractive prospect of having to spend them in some ungenial place, Socrates had less to lose by accepting his sentence than would have been the case had he been younger.

[40] Cf. Tierney, "Natural Rights in the Thirteenth Century," 64–65. Sondort, who deals briefly with this issue, seems to be crossing a line of when he says that the magistrate is the one who should be held culpable for the convict's escape and punished for neglecting his duty. *De iure naturae et gentium*, 8.3.4: "The delinquent is not at fault if he be

Henry was followed by the well-known sixteenth-century canonist Jacques Alamain, who agreed that a prisoner in this situation is not only permitted to flee but obliged to do so because he is required by natural law to preserve his life and body.[41] Tierney takes this as further evidence that the key concepts of the seventeenth-century rights theorists "often had medieval origins."[42]

But did they? To stick only to the issue at hand, Tierney overlooks the crucial fact that, by the time we come to these seventeenth-century theorists, the ban against inflicting bodily harm on one's judge or executioner has been lifted. Hobbes is again the one who makes the case most pointedly when he says that:

> no man is supposed bound by covenant not to resist violence, and consequently it cannot be intended that he gave any right to another to lay violent hands upon his person. In the making of a commonwealth, every man gives away the right of defending another, but not of defending himself. . . . But I have also shown formerly that before the institution of commonwealth every man had a right to everything and to do whatever he thought necessary to his own preservation, *subduing*, *hurting*, or *killing* any man in order thereunto; and this is the foundation of that right of punishing which is exercised in every commonwealth. For the subjects did not give the sovereign that right, but only in laying down theirs strengthened him to use his own as he should think fit for the preservation of them all (emphasis added).[43]

not put to death. The blame lies wholly upon the magistrate." Pufendorf's statement reflects the modern tendency to compensate for the greater freedom allowed to individuals by making greater demands on the government. Laws and institutions are now considered more reliable than moral character. See on this general topic H.C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: Free Press and London: Collier Macmillan, 1989).

[41]Tierney, ibid., 66.

[42]Ibid., 67.

[43]*Leviathan*, chap. 28. The earlier statement to which Hobbes alludes occurs in chap. 21, where it is stated that "if the sovereign command a man, though justly condemned, to kill, wound, or maim himself, or not to resist those that assault him . . . yet has that man the liberty to disobey." See in the same vein *De Cive* 2.18: "No man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or any other way hurt his body." See on this topic Thomas S. Schrock, who writes: "Thomas Hobbes was the first political thinker to declare a right in the guilty subject to resist the lawful and lawfully punishing sovereign." Schrock adds that this teaching precipitated a "crisis" in Hobbes's political theory, for "there are reasons to

The same view is affirmed, albeit with greater caution, by Locke, whose political system issues, like Hobbes's, in perfect rights rather than perfect duties. For Locke, as for Hobbes, the right of self-preservation, from which all other rights flow, is inalienable, which means that it is not in the power of human beings to surrender it even if they should wish to do so.[44] Locke's most powerful statement to this effect is the one that occurs in the *Second Treatise of Government*, where one reads:

> [F]or no man or society of men having a power to deliver up their preservation, and consequently the means of it, to the absolute will and arbitrary dominion of another, whenever anyone shall go about to bring them into such a slavish condition, *they will always have a right to preserve what they have not a power to part with*, and to rid themselves of those who invade *this fundamental, sacred, and unalterable law of self-preservation for which they entered into society* (italics mine).[45]

To be sure, Locke is careful to add that, just as one is bound to preserve oneself, so one is bound, as much as one can, to preserve the rest of mankind, but—and this is the telltale qualification—only so long as one's own preservation does not "come into competition" with anyone else's.[46] I take this to be just another way of saying that in the final analysis rights take precedence over duties. On this central point, both he and Hobbes stand together against all of their premodern predecessors.

Interestingly enough, it is often when they sound most alike that moderns and premoderns are furthest apart. The fact that in dealing with this matter both groups advert to the desire

doubt that the would-be Hobbesian sovereign can acquire a right to punish if the would-be Hobbesian subject has a right to resist punishment. If these two rights cannot co-exist within the same conceptual and political system, and if Hobbes will not rescind his declaration of the right to resist, his punishment dependent political theory is in trouble" (T. Schrock, "The Rights to Punish and Resist Punishment in Hobbes's *Leviathan*," *The Western Political Quarterly* 44 [1991]: 853–90).

[44]The term "inalienable," which the *Declaration of Independence* popularized, does not appear to have been used by Locke himself. It shows up in the *Virginia Declaration of Rights*, but only with reference to the right of revolution.

[45]*Second Treatise*, no. 149. On the derivation of all other rights from the basic right of self-preservation, see, for example, *First Treatise of Government*, nos. 86–88.

[46]*Second Treatise*, no. 6.

for self-preservation might lead us to think that they at least have this much in common; but closer examination reveals that this is not the case. For the medievals self-preservation is first and foremost a duty: one is not allowed to commit suicide or do anything that is liable to impair one's health.[47] As Thomas Aquinas, good Aristotelian that he is, puts it, "anyone who takes his own life commits an injustice, not toward himself [by definition, justice and injustice are always *ad alios*, i.e., directed toward others],[48] but toward God and toward his city, to whom he owes his services."[49] The same view is reflected in a felicitous statement by Godfrey of Fontaines that brings together both the objective and subjective dimensions of the problem:

> Because by the right of nature (*iure naturae*), everyone is bound (*tenetur*) to sustain his life, which cannot be done without exterior goods, therefore also by the right of nature each has dominion and a certain right (*quoddam ius*) in the common exterior goods of this world, which right also cannot be renounced.[50]

A very different note is sounded by Hobbes, Locke, and their followers, for whom self-preservation is not in the first instance a duty but a right that justifies not only the use of physical force against one's lawful executioner but the taking of one's own life, an act that the religious tradition always regarded as more grievously sinful than homicide and to which it attached

[47]Cf. Aristotle, *Nic. Ethics* 5.1138a9–13. It is true that the law does not expressly forbid suicide, but "what it does not expressly permit it forbids . . . He who through anger voluntarily stabs himself does this contrary to the right rule of life, and this the law does not allow; therefore, he is acting unjustly. But toward whom? Surely toward the city, not toward himself." A similar problem arises in connection with Socrates, who was accused of a crime for which, if found guilty, he could be sentenced to death. The question is whether he had a "duty" or a "right" to defend himself. In the *Apology*, his defense is presented as being first and foremost a duty: *philosophoûntá me deîn znv* (Apol. 28e). According to the modern view, it is without any doubt a "right." Cf. Spinoza, *Theologico-Political Treatise*, chap. 20.

[48]Cf. Aristotle, *Nic. Ethics* 5.1134b11: "No one chooses to hurt himself, for which reason there can be no injustice toward oneself." Cf. Thomas Aquinas, *Summa Theologiae* 2–2.58.2.

[49]*Summa Theologiae* 2.2.59.3.2; cf. 64.5. See also on the prohibition against suicide Suarez, *De triplici virtute theologica: de caritate* 13.7.18.

[50]*Quodlibet* 8.11, *Philosophes Belges* 4 (1924): 105. Cf. Tierney, "Villey, Ockham," 27.

severe penalties.[51] If self-preservation is an unconditional right and if, as Hobbes and Locke contend, such rights are to be defined in terms of freedom, that is to say, if human beings are free to exercise or not exercise them, one fails to see why it would be forbidden to commit suicide or allow onself to be enslaved by other human beings. Needless to say, most people will prefer life to death and freedom to slavery, but these have now acquired an altogether different status. They no longer appear as moral obligations laid upon us by a higher authority but as claims that one can assert against others. To quote Locke himself, the state that "all men are naturally in . . . is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man."[52] It is true that Locke limits the exercise of the rights that human beings enjoy in the state of nature to what is allowed by the "law of nature," but, as we saw earlier, in the state of nature, man and not God is the "executor of the law of nature." In that state there are no restrictions other than the ones that an individual may decide to impose on himself. This observation is only apparently contradicted by Locke's statement that "everyone is bound to preserve himself and not to quit his station wilfully," inasmuch as all human beings are "the workmanship of an omnipotent and wise Maker . . . made to last during his, not one another's pleasure."[53] Nowhere does Locke say that God has *commanded* human beings to maintain themselves in existence. What we learn instead is that human beings are directed by God to preserve themselves by means of their "senses and reason," just as the inferior animals are directed to preserve themselves by means of their "sense and instinct."[54] Both men and animals have, implanted in them by God, a desire for survival, but only in man does this desire give rise to a right, presumably because only men have reason and are thus able to figure out what is necessary for their self-preservation as well as their comfortable

[51]If the suicide attempt was successful, the dead person's property could be confiscated by the state. If it failed, other grave penalties were imposed. Until very recently, Roman Catholic canon law stipulated that anyone who committed suicide was not to be given a Christian burial.

[52]*Second Treatise* no. 4. See also, for a similar argument, no. 135.

[53]Ibid., no. 6.

[54]*First Treatise*, no. 86.

self-preservation.[55] The question then is what happens to the law prohibiting suicide once the desire for self-preservation in which it is rooted is lost because of intense pain or a hopelessly weakened physical condition. Clearly, the "law of nature" of which Locke speaks is his own natural law. It is strictly a matter of calculation and has nothing to do with the self-evident principles on which the moral life is said to rest by the medieval theorists. In short, it is not at all certain that in Locke's mind there were any compelling moral arguments against suicide.[56] On this score as on so many others, he and his medieval "predecessors," as Tierney would call them, could not be further apart.

Though unable on the basis of his own principles to deny the natural right of suicide, Locke may have been loath to defend it openly, not only because doing so would have been dangerous in the extreme—his teaching was already "strange" enough—but because the whole of his political theory stands or falls by the power that the fear of death and the desire for self-preservation are capable of exerting on people's minds. Absent this bulwark, any human being could, in the name of freedom, renounce the exercise of his most basic rights, whether they be the right to life, to limited government, or to freedom itself.[57] This could well be the point at which modern liberalism shows signs of recoiling upon itself. Is there or is there not at the heart of Locke's teaching a latent contradiction or, short of that, an irremediable tension?[58]

[55]Ibid., no. 87.

[56]For a valiant defense of the opposite view, see G.D. Glenn, "Inalienable Rights and Locke's Argument for Limited Government: Political Implications of a Right to Suicide," *The Journal of Politics* 46 (1984): 80–105. I am indebted to Prof. Walter Berns for part of my interpretation of Locke's stance and posture in regard to suicide.

[57]Such a concern would be analogous to that evinced by certain present-day anti-abortionists who insist on calling all abortion murder lest, by excluding from that category abortions performed in the earliest stages of the pregnancy, they should weaken their case against it.

[58]The tension reminds us in some way of the one found in Hobbes's theory, according to which the state has the right to put a criminal to death and the criminal the right to kill his executioner. Cf. *supra*, 11, n.1. Differently and more broadly stated, Hobbes was of the opinion that a war could be just on both sides at the same time. Beccaria later tried to solve the dilemma by advocating the abolition of capital punishment. In grappling with the same problem, some twentieth-century positivists have gone further and argued that survival or self-preservation is not an antecedently fixed goal or end but a contingent fact. We are committed to it only because our concern happens to be "with social arrangements for continued existence, not with those of a suicide club." H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 188. As far as I know, the first modern philosopher to rule out suicide altogether is Kant, who argues against it not on the ground of self-preservation but because it runs counter to the categorical imperative. Cf. *Foundations of the Metaphysics of Morals*, Second Section, and, for a fuller discussion, *Lectures on Ethics*, trans. L. Infield (New York: Harper & Row, 1963), 148–54.

Whatever the answer to the question, the foregoing considerations permit us to glimpse the reasons that motivated the sixteenth- and seventeenth-century revolt against premodern thought and convinced so many of its promoters of the need for a fresh start. The new rights theory was perhaps not entirely consistent, and, by grounding all ethical principles in the desire for self-preservation, a self-regarding passion, it did not of itself conduce to a high level of morality. But it was public-spirited. Its aim was to procure the good of society by putting an end to the massacres and bloody wars that had hitherto marked its life.[59] To paraphrase Mandeville, the trick consisted in turning private vices to public advantage.[60] A new kind of hedonism was born that supposedly enables one to enjoy the rewards of moral virtue without acquiring virtue itself, that is, without having to undergo a painful and chancy conversion from a concern for worldly goods to a concern for the good of the soul. In the process, morality itself was drastically simplified. The only virtue needed for the success of the enterprise was the one geared to the needs of society—"social virtue," as Locke called it[61]—rather than to the proper order of

[59]Cf. Descartes, *Discourse on Method*, First Part: "I compared the ethical writings of the ancient pagans to superb and magnificent palaces built only on mud and sand: they laud the virtues and make them appear more desirable than anything else in the world, but they give no adequate criterion of virtue; and often what they call by such a name is nothing but cruelty and apathy, parricide, pride, or despair."

[60]Bernard Mandeville, *The Fable of the Bees: or Private Vices, Public Benefits* (New York: Capricorn Books, 1962).

[61]*An Essay Concerning Human Understanding*, 1.2.4. The essential difference between the old and the new morality is well summed up by Locke, ibid., 2.28.5: "[I]f a Christian, who has the view of happiness and misery in another life, be asked why a man must keep his word, he will give this reason: because God, who has the power of eternal life and death, requires it of us. But if a Hobbist be asked why, he will answer: Because the public requires it, and the Leviathan will punish you if you do not. And if one of the old

the soul. Justice became not only the highest virtue but the only virtue, now reduced to the requirements of peace.[62] Tocqueville knew whereof he spoke when he said that America had managed to dignify selfishness by transforming it into a passably decent if not particularly elevated philosophy. In view of their revolutionary stand on a matter as grave as that of the origin and goals of human existence, it is not surprising that the leaders of the new movement should have been careful to express themselves in language that made them sound more conservative than they actually were. One notion well-suited to this purpose was that of the "state of nature," which began to figure prominently in their works and continued to do so for the next century and a half.

As used by Hobbes, Locke, and their many followers, the notion has highly individualistic connotations, predicated as it is on a nonteleological understanding of human nature. It derives the moral "ought" from the "is" or the "right" of self-preservation from the "desire" for self-preservation and thus denies that to be and to be good are two different things. One cannot portray human beings as atomic individuals who once existed in a so-called state of nature without implying that they are not naturally political and social or without subscribing to the view that their most basic impulse is not an attraction to the good, including the good of society, but an aversion to physical evil, along with an overpowering urge to overcome it.

By the middle of the seventeenth-century, however, the "state of nature" had become a commonplace in political literature and was used indiscriminately by authors on both sides of the divide. In his short but illuminating essay, *On the Natural State of Men*, Pufendorf distinguishes at least four different meanings of the expression, which can designate not only the prepolitical state postulated by the new theorists—the Hobbesian war of every man against every man, a state only slightly more politely described by Locke as "very unsafe, very insecure," full of fears and continual dangers[63]—but the perfect state in which Adam

philosophers had been asked, he would have answered: Because it was dishonest, below the dignity of man, and opposite to virtue, the highest perfection of human nature, to do otherwise."

[62] Cf. Hobbes, *Leviathan*, chap. 6, where all the other moral virtues—courage, liberality, magnanimity, and the like—are demoted to the rank of passions.

[63] *Second Treatise*, no. 123.

was created, the cultural state in which human beings are presumed to have existed prior to the emergence of civil society, or any pagan or pre-Christian civil society, such as classical Greece.[64] This ambiguity is precisely what made it possible for the new theorists to pass their "strange" doctrines off as more or less standard theological fare.

Pufendorf's essay is valuable in that it gives us a better idea of how much he and his contemporaries had learned from the opposition that the "justly decried Hobbes" had aroused and how circumspect they had become in dealing with issues as explosive as these.[65] Pufendorf himself leans heavily on Hobbes, for whom he evinces an obvious preference—he was known as the "German Hobbes"—but not without injecting into the discussion a series of disclaimers that give the impression of his wanting to dissociate himself from Hobbes's most extreme positions. It is almost as if he were using the state of nature as a shield with which to protect himself. After all, no less a figure than the eminently respectable Grotius, to say nothing of others, had made use of the expression and thereby removed from it any taint of heterodoxy or impiety.

Virtually all the writers of Pufendorf's and Locke's generation, it seems, had mastered the art of concealing their "novelties" by cloaking them in a more or less traditional garb. The "state of nature," with its vague theological connotations, is only one example of this procedure. Francis Bacon had already admonished radical innovators to express themselves only in familiar terms, adding that one should always begin by telling people what they most want to hear, that is, what they are accustomed to hearing.[66] This appears to be exactly what most of

[64] For a discussion of the different versions of the natural state available in the seventeenth-century and in Pufendorf, see the M. Seidler's introduction to his edition and translation of Pufendorf's essay (Lewiston, N.Y.: Edwin Mellen Press, 1990), 28–31.

[65] See on this subject Locke's long discussion of caution and judicious concealment in *The Reasonableness of Christianity* (Washington, D.C.: Regnery Gateway, 1965), 39–123. Cf. also, on the pains taken by Locke publicly to distance himself from Hobbes, R. Horwitz's introduction to his translation of Locke's *Questions Concerning the Law of Nature* (Ithica, N.Y. and London: Cornell University Press, 1990), 5–10.

[66] *The Plan of the Great Instauration, init.* On the use of esotericism in the premodern tradition, cf. Grotius, *De iure belli et pacis* 3.1.7–20. Also, for recent assessments of the problem as it posed itself in the early modern period, P. Bagley, "On the Practice of Esotericism," *Journal of the History of*

our seventeenth-century writers did. As a result, it became customary to pass over the crucial differences that set Grotius apart from Locke and Pufendorf and lump the three of them together as fellow travelers or members of the same ideological camp. Grotius does mention the state of nature on two occasions, but to designate pre-Christian civil society and not Hobbes's or Locke's precivil state.[67] Unlike Hobbes, Locke, and Pufendorf, in whose works Aristotle's name hardly ever appears, he holds Aristotle in highest esteem;[68] and he endorses wholeheartedly the patented Aristotelian teaching that human beings are political by nature.[69] His is still a basically classical and medieval outlook, now brought to bear on the problems of his time.

This brings us back to the question with which we started, namely, whether any ultimate reconciliation between modern and premodern ethical thought is possible. To restate that question in terms more germane to Tierney's argument: Is the seventeenth-century rights theory an offshoot of medieval theological and legal speculation or merely an accidental byproduct of its later development, if even that?

The early modern writers, with whom any discussion of the problem must begin if not necessarily end, certainly understood themselves to be breaking entirely new ground and to be doing so on the basis of a radical critique of the premodern tradition. Many of them, from Machiavelli onward, thinking

Ideas, vol. 53, no. 2 (April-June, 1992): 231–47. D. Wootten, "Lucien Febvre and the Problem of Unbelief in the Early Modern Period," *Journal of Modern History* 60 (1988): 695–730.

[67]*De iure belli*, 2.5.15.2. See also 3.7.1, where the expression *primaevus naturae status* is used in a similar sense.

[68]*Prolegomena to the Law of War and Peace*, no. 42: "Among the philosophers Aristotle deservedly holds the foremost place, whether you take into account his order of treatment, or the subtlety of his distinctions, or the weight of his reasons." Grotius nevertheless thought it possible to improve upon the teaching of his master by providing a more methodical treatment of the subject matter of his book and by illustrating his teaching by means of a larger number of historical examples. Cf. ibid., nos. 1 and 38.

[69]Ibid., 6: "Among the traits characteristic of human beings is an impelling desire for society, that is, for the social life, not of any and every sort, but peaceful and organized according to the measure of their intelligence, with those of their own kind. This social inclination the Stoics called 'sociableness.' Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded

that they had discovered a new continent, likened themselves to Christopher Columbus and were ready to burn their ships behind them.[70] They, at least, were convinced of the fundamental irreconcilability of the two positions and hence of the necessity to choose between them. Accordingly, they saw the war in which they were engaged, not as a civil war pitting rival factions against each other within a divided city, but as a war between two continents neither one of which could survive unless the other was destroyed. Francis Bacon stated the problem as well as anyone else when he located the opposition between the two groups on the level of "first principles and very notions, and even upon forms of demonstrations," in which case "confutations [i.e., rational arguments] cannot be employed." The only safe way to proceed, he concluded, was to insinuate one's new doctrines "quietly into the minds that are fit and capable of receiving it."[71] Hobbes is no less explicit, particularly as regards the issue of rights and duties. "Right," he says, "consists in liberty to do, or to forbear: whereas law determines and binds to one of them, so that law and right differ as much, as obligation and liberty; which in one and the same matter are inconsistent."[72] If Hobbes is to be taken at his word, the modern rights theory was no mere attempt to erect a new structure on the old foundation of classical and Christian ethics. Its ambition was to lay down an entirely new foundation, to wit, a selfish passion—the desire for self-preservation—and go on from there to devise a political scheme that would be in accord with it from the start. As usual, Hobbes is the one who stated the issue most forcefully when he wrote in the short Epistle Dedicatory to his *De natura hominis*:

> To reduce this doctrine to the rules and infallibility of reason, there is no way but, first, to put such principles down for a foundation as passion, not

[70]Machiavelli, *Discourses*, Book 1, Introduction. Cf. F. Bacon, *New Organon*, 92: "And therefore it is fit that I publish and set forth those conjectures of mine which make hope in this matter reasonable, just as Columbus did, before that wonderful voyage across the Atlantic, when he gave the reasons for his conviction that new lands and continents might be discovered besides those which were known before; which reasons, though rejected at first, were afterwards made good by experience and were the causes and beginnings of great events."

[71]*New Organon*, 1.35.

[72]*Leviathan*, chap. 14.

mistrusting, may not seek to displace, and afterwards to build thereon the truth of cases in the law of nature, which hitherto have been built in the air.[73]

Let us grant for the sake of argument that no ultimate synthesis between a consistent natural law theory and a consistent natural rights theory is possible. Does this mean that any kind of rapprochement between them is out of the question? Not necessarily. One thing is nevertheless certain: no such rapprochement can be effected on the basis of a principle that transcends the original positions, each one of which claims supreme status for itself. This leaves only one possibility: a rapprochement effected on the basis of the highest principles of one or the other of these two positions.

The need for some such mediation began to be felt in the Middle Ages when important social and demographic changes gave rise to a more complex juridical system. Tierney's studies may or may not have shown that individual rights are a product of twelfth- and thirteenth-century jurisprudence, but they do show with admirable lucidity to what extent our medieval forebears managed to find a place for rights within a human order that reflects the natural order of the universe. The modern world has been experimenting for close to four centuries with a theory that subordinates law to rights. The results have been mixed at best, and this is what lends a measure of credibility to the now frequently heard calls for a reexamination of the discarded alternative, which insisted on the subordination of rights to duties or the common good.

My immediate concern was not to argue for the superiority of either of these two distinct approaches to the study of ethics and politics but to clarify the difference between them and caution against any hasty identification of one with the other. A thorough grasp of the problem would involve us in a much more methodical investigation of the implications of an ethics of virtue or character versus an ethics of rights, as well as the implications of a teleological versus a nonteleological understanding of human life. Tierney, who is more interested in the historical and legal aspects of the question than in its philosophic or theological aspects, has not seen fit to undertake this kind of investigation and I shall not undertake it, either.[74]

[73] Hobbes, *De natura hominis*, cf. Epistle Dedicatory.

[74] A more adequate discussion would obviously have to take full account of the important modification that the modern rights doctrine underwent at the hands of Kant and his followers. For all its stress on duty, however, Kant's moral doctrine is still in the end a doctrine of rights rather than of virtues.

Still, one cannot help wondering whether the argument in favor of the medieval pedigree of the modern rights doctrine does not owe much of its appeal to the fact that it combines in neat, if somewhat unexpected, fashion a deep-seated longing for a glorious Christian past with a powerful attachment to the freedoms of the modern age.[75] It would not be the first time that scholarly judgment on matters as complex as this one is influenced to a greater or less degree by considerations of an extratheoretical nature.* □

[75] On the widespread trend to rehabilitate the once discredited Middle Ages and trace to them the major achievements of the modern age, see the provocative if at times impressionistic book by N.F. Cantor, *Inventing the Middle Ages: The Lives, Works, and Ideas of the Great Medievalists of the Twentieth Century* (New York: W. Morrow, 1991).

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